

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2155

Cir. Ct. No. 2015CV38

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JOSEPH A. ZANKL,

PLAINTIFF-RESPONDENT,

V.

**ARTISAN AND TRUCKERS CASUALTY COMPANY, DENNIS J. GAEDTKE
AND HUMANA INSURANCE COMPANY,**

DEFENDANTS,

AUTO-OWNERS INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County:
JOSEPH W. VOILAND, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Auto-Owners Insurance Company (Auto-Owners) appeals from a nonfinal order denying its motion to enforce a mediation settlement agreement. As the circuit court properly exercised its discretion in denying enforcement, we affirm.

¶2 The underlying facts are not in dispute. On August 24, 2012, Joseph A. Zankl was seriously injured in an automobile accident after he was struck by a drunk driver. Zankl sued the drunk driver as well as Auto-Owners, with whom Zankl had an underinsured motorist (UIM) policy. Unfortunately, neither Auto-Owners or Zankl's attorney made an adequate investigation prior to mediation as to the amount of coverage available under Zankl's UIM policy. At mediation, Zankl initially requested \$1 million from Auto-Owners to settle his claims. An Auto-Owners declarations page was exhibited, which reflected \$500,000 in UIM coverage. Zankl said he had additional UIM coverage with Auto-Owners via an umbrella policy, but Auto-Owners said it was unaware of an umbrella policy. Zankl contacted his insurance agent during the mediation and was told that while he did have a \$1 million umbrella policy with Auto-Owners, it did not provide UIM coverage.

¶3 Given this information, negotiations continued between Zankl and Auto-Owners with the understanding that \$400,000¹ in insurance coverage was

¹ Zankl had \$500,000 in UIM coverage through Auto-Owners. The drunk driver's insurer tendered its \$100,000 liability policy limit, which operated to reduce the limit of UIM coverage available to Zankl under the Auto-Owners policy from \$500,000 to \$400,000.

available. The parties reached a settlement for \$185,000.² Later that day, Zankl's insurance agent contacted Zankl and informed him that his umbrella policy actually did provide UIM coverage, which meant that Zankl had \$1.4 million in available coverage, rather than the \$400,000 all parties thought was available at mediation.

¶4 Zankl sought to rescind the settlement agreement. Auto-Owners moved the court to enforce the agreement. The court found that Auto-Owners had a duty to disclose the \$1 million UIM coverage and the failure to disclose was a “material omission” and grounds for rescission of the settlement agreement. This appeal follows.³

¶5 Auto-Owners argues the circuit court erroneously exercised its discretion by not enforcing the settlement agreement. Auto-Owners asserts that the settlement agreement was a contract under WIS. STAT. § 807.05 (stipulations) and the court should have enforced it as such.⁴ We conclude that a challenge to a mediation settlement agreement under § 807.05 should be analyzed

² Zankl preserved his right to sue the drunk driver personally.

³ Auto-Owners filed a petition to appeal the court's nonfinal order, which we granted on December 6, 2016. WIS. STAT. RULE 809.50(3) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

⁴ WISCONSIN STAT. § 807.05 is applicable to agreements and stipulations reached as a result of alternative dispute resolutions as outlined in WIS. STAT. § 802.12, which includes mediation.

under WIS. STAT. § 806.07⁵ (relief from a judgment, order or stipulation).

¶6 A circuit court's order granting relief from a mediation settlement agreement is addressed to the court's discretion under the analysis set forth in WIS. STAT. § 806.07(1). *Phone Partners Ltd. P'ship v. C.F. Commc'ns Corp.*, 196 Wis. 2d 702, 710, 542 N.W.2d 159 (Ct. App. 1995); *Shuput v. Lauer*, 109 Wis. 2d 164, 177, 325 N.W.2d 321 (1982). "The standards in § 806.07 are congruent with the equitable standards that permit a trial court to grant relief from a voidable contract, for example, mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation or other misconduct of an adverse party." *Phone Partners*, 196 Wis. 2d at 709-10 (citing *Kocinski v. Home Ins. Co.*, 154 Wis. 2d 56, 68, 452 N.W.2d 360 (1990)). We will sustain a discretionary act if the circuit court examined the relevant facts, applied a proper standard of law and used a demonstrated rational process, reaching a conclusion that a reasonable judge could reach. *Phone Partners*, 196 Wis. 2d at 710. The plain language of § 806.07(1) does not prevent a court from acting sua sponte under the statute's authority. *Larry v. Harris*, 2008 WI 81, ¶¶24-25, 311 Wis. 2d 326, 752 N.W.2d 279.

⁵ WISCONSIN STAT. § 806.07(1) reads in pertinent part:

On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order *or stipulation* for the following reasons:

(a) *Mistake*, inadvertence, surprise, or excusable neglect;

....

(c) Fraud, *misrepresentation*, or other misconduct of an adverse party;

....

(h) Any other reasons justifying relief from the operation of the judgment.

(Emphasis added.)

¶7 We begin with the undisputed fact that everyone operated under the mistaken belief that available coverage was \$400,000, rather than the true amount of \$1.4 million. A “mistake” is grounds for relief from a judgment, order, or stipulation. WIS. STAT. § 806.07(1)(a). We agree that the mistake in the amount of coverage was material and that the settlement negotiations were based on inaccurate information. We also consider that as a first-party insurer, Auto-Owners had a good faith duty to deal fairly with its insured. *See Danner v. Auto-Owners Ins.*, 2001 WI 90, ¶¶45, 54, 245 Wis. 2d 49, 629 N.W.2d 159.

¶8 Who is at fault for the material mistake of fact is immaterial. The circuit court properly exercised its discretion by requiring that all parties have the correct information as to available coverage at the mediation in order for a settlement agreement to be enforced. *See generally Allstate Ins. Co. v. Konicki*, 186 Wis. 2d 140, 519 N.W.2d 723 (Ct. App. 1994).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

